TANG KWOR HAM

v.

PENGURUS DANAHARTA NASIONAL BHD & ORS (NO 2)

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[JUDICIAL REVISION NO: 13-2-2002]
16 JUNE 2006

CIVIL PROCEDURE: *Judge - Judge to recuse himself - Double recusal applications - Whether judge had jurisdiction to direct another High Court judge to hear applications - Natural justice - Proper forum for requisite direction - Whether applications abuses of process of court*

The 2nd and 3rd applicants ('the applicants') filed a notice of motion in encl. 33 for the learned judge in the present case ('the said judge') to be recused from hearing the substantive motion in encl. 23 ('the substantive motion'). Pursuant to the application filed by, *inter alia*, the applicants under O. 53 r. 3 Rules of the High Court 1980, seeking leave for judicial review, the said judge delivered his judgment against which the applicants filed an appeal. The Court of Appeal in a majority judgment allowed the applicants' appeal with costs and set aside all the orders contained in the said judge's judgment, remitting the matter to the High Court so that it may be proceeded with and disposed of in the ordinary way. Pursuant to the majority judgment, the applicants filed the substantive motion; before the substantive motion could be heard, the applicants filed encl. 33, supported by encl. 34 (the affidavit in support). The applicants also made an oral application for the purpose of seeking an order from the said judge that he recuse himself from hearing encl. 33 (the oral application and encl. 33 coupled with the grounds in encl. 33 were collectively referred to as 'the double recusal applications'). The applicants submitted that the said judge should direct, find or get another High Court judge to hear the double recusal applications and the substantive motion.

Held (striking out the double recusal applications):

(1) Applying ss. 67(1), 69(1) and (4) Courts of Judicature Act 1964 ('CJA') to an appeal preferred before the Court of Appeal, the order which the Court of Appeal makes pursuant thereto is a judicial order. It is within the jurisdiction of the

Court of Appeal under s. 69(4) CJA to give direction upon the determination of the appeal before it. Such jurisdiction included the making of such further or other orders as the case requires, *eg*, the jurisdiction to give direction as to whether, given the factual background of this case, another High Court judge or the said judge should hear the substantive motion. This direction may be given by the Court of Appeal at the time of disposing of the appeal before it or subsequently by way of additional direction or clarification. In the circumstances, there could be no doubt that it was beyond the said judge's jurisdiction to make an order directing, finding or getting another High Court judge, either in the same state or from another state, to hear the double recusal applications and the substantive motion. (paras 23 & 24)

(2) The oral application sought to recuse the said judge from hearing encl. 33, and encl. 33 in turn sought to recuse the said judge from hearing the substantive motion. In the double recusal applications, the said judge had been made the subject matter, in which the order sought to be made by the said judge *ie*, either to recuse himself or to refuse to recuse himself, would require the said judge to be the judge of his own cause. In other words, he would have to be the judge of his own partiality or impartiality. That would most certainly contravene one of the two fundamental pillars of natural justice *ie*, *nemo debet esse judex in propria causa* (no one should be a judge in his own cause). (para 30)

(3) The said judge was in no position to speculate on the motive of the applicants' counsel in making and filing the double recusal applications, when the obtaining of an order from the said judge to recuse himself or to refuse to recuse himself would in either event contravene the aforesaid rule of natural justice. Further, as analysed above and conceded by all the respective counsel for the respondents, there was a proper and appropriate forum *ie*, the same Court of Appeal panel to give the requisite direction or clarification which would have provided an authoritative answer to the double recusal applications. Therefore, the double recusal applications were obvious illustrations of abuses of the process of the court and ought to be struck out. (paras 35 & 38)

Case(s) referred to:

Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors [2000] 5 CLJ 229 HC ***(refd)***

Bumicrystal Technology v. Rowstead Systems Sdn Bhd [2004] 6 CLJ 85 HC ***(refd)***

Chong Siew Choong v. PP [1996] 2 CLJ 823 HC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***

Her Majesty's Attorney-General v. Pelling [2006] 1 FLR 93 QBD ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Lee Chan Leong v. Jurutera Konsultant (SEA) Sdn Bhd & Ors [2002] 4 CLJ 1 CA ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Ng Kim Moi & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus [2004] 3 CLJ 131 CA ***(refd)***

Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC

PP v. Miswadi Radol & Ors [1996] 3 CLJ 763 HC ***(refd)***

Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Wakil Diri Bagi Assahari Daud v. Meriam Ishak & Ors [2004] 4 CLJ 118 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 20, 67(1), 69(1), (2), (4)

Rules of the High Court 1980, O. 18 r. 19, O. 53 r. 3, O. 92 r. 4

For the applicant - Lim Whei Chun; M/s Lim Whei Chun

For the 1st respondent - Sathya Kumardas; M/s Shearn Delamore & Co

For the 2nd-4th respondents - SM Shanmugam; M/s Lee Hishammuddin Allen & Gledhill

For the 5th respondent - S Sivam; M/s Thangaraj & Assoc

Reported by Suresh Nathan

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JUDGMENT

Low Hop Bing J:

Application

B **[1]** Before me is the notice of motion in encl. (33) filed by applicants 2 and 3 (collectively, "the applicants") seeking the following reliefs:

(1) that I be recused from hearing the substantive notice of
C motion in encl (23) ("the substantive motion") seeking, *inter alia, certiorari*;

(2) that respondents 1 to 5, jointly and severally, pay to the applicants all the costs in encl (33); and

D (3) such other reliefs as the court deems fit.

Grounds Of Application

[2] As closely as possible, I shall adhere to the gist of the
E grounds stated by the applicants' solicitors in encl (33). These grounds are:

(1) I have in my judgment in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2003] 7 CLJ 205 decided as follows:

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> In my view, having regard to the factual background as alluded to above, as apparent from the affidavits and statement of the applicants, I hold that in relation to this application for judicial review, there is no arguable case.

G ("my judgment");

(2) I have personal (own or self) interest in that the success of the substantive motion would constitute a "repudiation of" my judgment; conversely its failure (on the basis of no arguable
H case) would constitute a vindication of my judgment;

(3) I have a "conflict of interests" in that my personal (own or self) interest stated in ground (2) above is in conflict with the applicants' interest (in the success of the substantive motion);

I (4) Under the law, I am automatically disqualified or recused from hearing the substantive motion;

(5) Alternatively, there is "a real danger of bias" on my part in the sense that I might unfairly regard with disfavour the case of the applicants to the issue under consideration; and

(6) A "fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility" that I am biased; or alternatively "give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public".

[3] The affidavit in support (encl (34)) was affirmed by deponent Tang Sheit Fun (applicant 3) who in paras 3 to 5 thereof had parroted all the grounds contained in encl (33), while paras 6 and 7 thereof referred to my judgment and, on appeal, the judgments of the Court of Appeal, in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 CA.

Factual Background

[4] A reference to an order and a rule hereinafter is a reference to that order and rule in the Rules of the High Court 1980 unless otherwise stated.

[5] Pursuant to the application in encl (11) filed by, *inter alia*, the applicants under O. 53 r. 3, seeking leave for judicial review, I have delivered my judgment against which the applicants have filed an appeal ("the appeal").

[6] The Court of Appeal in a majority judgment (2-1) allowed the applicants' appeal with costs. In setting aside all the orders contained in my judgment, Gopal Sri Ram JCA (with the concurrence of Hashim Yusoff JCA) in para 64 of the majority judgment at pp 966 and 967 made the following specific order:

> I would remit this matter to the court below so that it may be proceeded with in the ordinary way. The applicants shall file their substantive motion within 14 days from today and serve a copy of the same (after extraction) on the respondents. We will now fix this matter for mention before the High Court at Melaka on a mutually convenient date with a direction to expeditiously dispose of this matter.

Zaleha Zahari JCA in delivering the dissenting judgment in para 103 at p. 976 held that I was right in concluding that there was no arguable case. In para 105 thereof her Ladyship dismissed the applicants' appeal with costs.

[7] Pursuant to the majority judgment, the applicants had on 7 November 2005 filed the substantive motion which had been fixed for hearing on 5 December 2005.

[8] On 5 December 2005, when the matter was called before me, all parties were represented by their respective learned counsel, including Miss Amy Yeo who mentioned on behalf of the applicants' solicitor. I directed the parties to file their respective affidavits according to specific time frame. Hearing of the substantive motion was then fixed for 1 June 2006.

[9] Before the substantive motion could be heard on 1 Jun 2006, the applicants' solicitor and learned counsel Mr. Lim Whei Chun ("applicants' counsel") filed encl (33), supported by encl (34).

[10] When encl (33) came up for hearing, I was of the view that it would be fair and just for the applicants and/or their counsel to be given the opportunity of considering some other more appropriate and practical options. Hence, before the hearing of encl (33), I had offered to the applicants' counsel the following three options:

(1) To withdraw encl (33) and make an application to the same panel of learned judges in the Court of Appeal for an order as to whether another High Court judge or I should hear the substantive motion;

(2) To withdraw encl (33) and proceed with the hearing of the substantive motion before me; or

(3) To proceed with the hearing of encl (33) before me.

[11] I requested the applicants' counsel to take half an hour or so in order to arrive at a mature consideration and decision. However, he instantly elected to decline all the three options. Meanwhile, he made an oral application, for the purpose of seeking an order from me that I also recuse myself from hearing encl (33).

[12] The oral application and encl (33) coupled with the aforesaid grounds are collectively referred to hereinafter as "the double recusal applications".

Section 20 Courts Of Judicature Act 1964

[13] In attempting to seek an order from me that I recuse myself from hearing the double recusal applications and the substantive motion, applicants' counsel submitted that I should direct, find or get another High Court judge ("judge") from another state to hear the double recusal applications and the substantive motion, as Abu Samah Nordin J, the other judge in Melaka, is currently on medical leave.

[14] In response, it was submitted by learned counsel Miss Sathya Kumardas for the first respondent that one judge cannot direct another judge. Respective learned counsel for all the other respondents had associated themselves with this submission for the first respondent.

[15] The above submissions remind me of the case ie, *Her Majesty's Attorney-General v. Pelling* [2006] 1 FLR 93 QBD, where the Attorney-General applied for *inter alia* an order of committal in respect of what was said to be a grave contempt of court, perpetrated by the defendant. The defendant called for Laws LJ, one of the judges hearing the committal proceedings, to recuse himself, on the basis of actual or perceived bias against the defendant. The defendant submitted that the court should adjourn the proceedings so that he might apply to another judge, or another constitution of the court, for a determination of the question whether Laws LJ should stand down and take no further part in the case. On this issue, Laws LJ in para 5 of the judgment held where relevant as follows:

> ... to adjourn the case for another judge to decide the question is more likely to be more injurious to the doing of justice and so far as we know, has never been the practice. If it were the practice, it would mean that proceedings would be liable to adjournment, and thus delay, in every case where an application for a judge's recusal was made, ... In particular, the court's process would be open to manipulation and contrived delay at the hands of disaffected litigants.

[16] Be that as it may, I am of the view that in our High Courts, all judges (including judicial commissioners) are vested with co-ordinate jurisdiction. One of the legal effects of this co-ordinate jurisdiction is that judge A has no jurisdiction to direct, find or get judge B, less so from another state, to hear a cause or matter which has been filed and registered for hearing before judge A.

In the same vein, judge B has no jurisdiction to make an order which is intended to recuse judge A from hearing any matter which has been filed and registered for hearing before judge A. This principle applies whether the judges are resident in the same state or different states. Only the Chief Judge is conferred with the power and jurisdiction relating to the distribution of business among the judges and that is regulated by s. 20 of the Courts of Judicature Act 1964.

[17] A reference hereinafter to a section is a reference to that section in the Courts of Judicature Act 1964 unless otherwise stated.

[18] Under s. 20, such distribution shall be made in accordance with such directions, which may be of a general or particular nature, as may be given by the Chief Judge (see eg, *Chong Siew Choong v. Public Prosecutor* [1996] 2 CLJ 823 per Abdul Malik Ishak J; *Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors* [2000] 5 CLJ 229 at p. 233d to e per Abdul Wahab Patail J; *Public Prosecutor v. Miswadi Radol & Ors* [1996] 3 CLJ 763, at p. 766e-f per Abdul Malik Ishak J; *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22 per Augustine Paul J (now FCJ); *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 at p. 539i per Gopal Sri Ram JCA; *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113 at p. 133 g-h; and *Lee Chan Leong v. Jurutera Konsultant (SEA) Sdn Bhd & Ors* [2002] 4 CLJ 1 at p. 3h per Gopal Sri Ram JCA). Hence, only the Chief Judge has the power and jurisdiction to embark upon the distribution exercise for the purpose of directing eg, judge B to hear any matter filed and registered for hearing before judge A.

[19] I would with the utmost respect add that the direction(s) given by the Chief Judge pertaining to distribution under s. 20 is of an administrative nature as opposed to a judicial order. Such administrative direction is generally effected where eg, there has been no appeal to the Court of Appeal.

[20] Where a judgment or order from the High Court has proceeded by way of appeal to the Court of Appeal, then respectfully, I am of the view that s. 20 would be inapplicable. Instead ss. 67(1), 69(2) and (4) would apply.

[21] Section 67 confers upon the Court of Appeal the jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter.

[22] Under s. 69(1), appeals to the Court of Appeal shall be by way of re-hearing, and s. 69(4) gives the Court of Appeal the power to give any judgment, and make any order which ought to have been given or made, "and make such further or other orders as the case requires". A

[23] Hence, applying ss. 67(1), 69(1) and (4) to an appeal preferred before the Court of Appeal, the order which the Court of Appeal makes pursuant thereto is a judicial order. It is within the jurisdiction of the Court of Appeal under s. 69(4) to give direction upon the determination of the appeal before it. Such jurisdiction includes the making of such further or other orders as the case requires, eg, the jurisdiction to give direction as to whether, given the above factual background, another judge or I should hear the substantive motion. This direction may be given by the Court of Appeal at the time of disposing of the appeal before it or subsequently by way of additional direction or clarification. See *Ng Kim Moi & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus* [2004] 3 CLJ 131 at p. 151i per Gopal Sri Ram JCA, in delivering a dissenting judgment in the Court of Appeal; *Wakil Diri Bagi Assahari Daud v. Meriam Ishak & Ors* [2004] 4 CLJ 118 at p. 125f-g per Abdul Kadir Sulaiman JCA (later FCJ) in delivering the judgment of the Court of Appeal; *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 at p. 27B-D per Gopal Sri Ram JCA in delivering judgment of the Court of Appeal; and the cases cited therein; and *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 CA at p. 520D-E per Mohd Ghazali Yusoff JCA. B C D E F

[24] In the circumstances, there can be no doubt that it is beyond my jurisdiction to make an order directing, finding or getting another judge, either in the same state or from another state, to hear the double recusal applications and the substantive motion. G

Same Court Of Appeal Panel

[25] Applicants' counsel stressed that it is unprecedented for him to make an application to the same panel of the Court of Appeal to obtain an order whether another judge or I should hear the substantive motion, and repeated that I should make an order to recuse myself from hearing the double recusal applications and the substantive motion. Applicants' counsel relied on *Rowstead Systems* H I

Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA; and *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577 FC.

[26] The stand taken respectively for all the respondents was that it is normal for parties to seek an order by way of additional direction or clarification as to which judge should hear the substantive motion.

[27] As I have opined above, where the applicants and/or their counsel are desirous of seeking an order to recuse me from hearing the substantive motion, they should have, at the time of the determination of their appeal by the Court of Appeal, immediately sought an order or direction from that Court as to which particular judge should hear the substantive motion.

[28] Although the applicants and/or their counsel had not done so in the Court of Appeal at that time, they are not precluded from doing so, even some seven months later. It is only fitting and proper for them to seek an order, direction or clarification from the same panel of the Court of Appeal as to which particular judge should hear the substantive motion.

[29] Having had the advantage of an advanced and analytical reading and understanding of the double recusal applications, as explained earlier, I had earnestly wished that it would have been possible for me to offer a practical approach and solution by offering the three options above, in particular option (1) as there can be no doubt that the Court of Appeal is the proper forum to decide on the particular judge who should hear the substantive motion.

[30] One has to appreciate the nature and content of the double recusal applications. The oral application seeks to recuse me from hearing encl (33), and encl (33) in turn seeks to recuse me from hearing the substantive motion. In the double recusal applications, I have been made the subject matter, in which the order sought to be made by me ie, either to recuse myself or to refuse to recuse myself, would require me to be a judge of my own cause. In other words, I would have to be a judge of my own partiality or impartiality. That would most certainly contravene one of the two fundamental pillars of natural justice ie, *nemo debet esse judex in propria causa* (no one should be a judge in his own cause).

[31] In *Bumicrystal Technology v. Rowstead Systems Sdn Bhd* [2004] 6 CLJ 85 HC, there was an application by the defendant for Mohamad Apandi Ali JC (now J) to recuse himself from hearing the case, on the ground of a possibility of bias. His Lordship heard and dismissed the defendant's application, finding that there was no reasonable reason or excuse to recuse. The defendant lodged an appeal and meanwhile applied, in the Court of Appeal, for stay of proceedings before the High Court, pending the decision on the appeal in the Court of Appeal. At the hearing of the stay application in the Court of Appeal in *Rowstead Systems Sdn Bhd, supra,* Azmel Maamor J (now JCA) in delivering the judgment of the court, granted the stay. His Lordship posed the more important question and answered the same at p. 471 a-c as follows:

> ... But the more important question to be asked is whether it is proper for such decision to be made by the presiding judge against whom bias has been alleged? In other words, when a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, would such decision not infringe the rule of natural justice in that "one should not be a judge in one's own cause". This, we think, is the crux of the instant case. ...

Meanwhile, I am also mindful of the observation of Abdul Hamid Mohamad FCJ in *Dato' Tan Heng Chew, supra,* at p. 592 in para 31 to the effect that the court should be vigilant not to allow parties to do "judge-shopping" by recusal of judges.

[32] In my view, *Dato' Tan Heng Chew, supra,* FC; and *Rowstead Systems Sdn Bhd, supra,* CA cited by the applicants' counsel do not support his contention that in the double recusal applications I should make an order to recuse myself or conversely not to recuse myself.

Abuse Of Process Of Court

[33] All the above submissions presented for the respective parties would require me to address the question of whether the double recusal applications would constitute a category of abuse of the process of the court.

[34] As in the law of contempt of court and the law of negligence, the circumstances and categories which may arise in a particular case and which may constitute an abuse of the process

of the court are never closed. Since the scope for development is limitless, it is neither possible nor prudent to provide a formula or an exhaustive list to cover the infinite categories.

[35] I am in no position to speculate on the motive of the applicants' counsel in making and filing the double recusal applications, when the obtaining of an order from me to recuse myself or to refuse to recuse myself, would in either event contravene the aforesaid rule of natural justice. Further, as analysed above and conceded by all the respective counsel for the respondents, there is a proper and appropriate forum ie, the same Court of Appeal panel to give the requisite direction or clarification which would have provided an authoritative answer to the double recusal applications. In my view, the double recusal applications are obvious illustrations of abuses of the process of the court, and such abuses are capable of being struck out.

[36] In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, Peh Swee Chin SCJ (as he then was) in delivering judgment of the Supreme Court, made it absolutely clear that the High Court always has an inherent jurisdiction to prevent an abuse of its process irrespective of whether or not it is expressly called for in an application under O. 18 r. 19.

[37] I would in all humility add that O. 92 r. 4 expressly provides for the inherent powers of the High Court to deal with an abuse of the process of the court, in the following words:

> **4 Inherent powers of the Court (O. 92 r. 4)**
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(See eg, *Leong Kum Whay, supra,* at p. 27D-E per Gopal Sri Ram JCA).

Conclusion

[38] On the foregoing grounds, I hereby strike out the double recusal applications, being abuses of the process of the court, with costs to all the respondents.